No. 78-1595

# In the Supreme Court of the United States

OCTOBER TERM, 1979

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GEORGE CALVIN LEWIS, JR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (A. 13-27) is reported at 591 F.2d 978.

### JURISDICTION

The judgment of the court of appeals (A. 28) was entered on January 24, 1979. A petition for rehearing was denied on March 19, 1979 (A. 29). The petition for a writ of certiorari was filed on April 18, 1979, and was granted on June 18, 1979 (A. 30). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether a defendant who is a previously convicted felon may challenge the constitutionality of his prior conviction as a defense to a prosecution for unlawfully possessing a firearm.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

3. 18 U.S.C. 925(c) provides in pertinent part:

> A person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the



> conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest. * * *

4. 18 U.S.C. App. 1202(a) provides:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
>
> (2) has been discharged from the Armed Forces under dishonorable conditions, or
>
> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
>
> (4) having been a citizen of the United States has renounced his citizenship, or
>
> (5) being an alien is illegally or unlawfully in the United States,
>
> and who receives, possesses or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

5. 18 U.S.C. App. 1203 provides:

> This title shall not apply to—
>
> (1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and
>
> (2) any person who has been pardoned by the President of the United States or

the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

## STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner, who had previously been convicted of a felony, was convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. App. 1202(a)(1). Petitioner was sentenced to a term of 18 months' imprisonment. A divided panel of the court of appeals affirmed (A. 13-27).

1. The undisputed evidence at trial showed that on January 28, 1977, Henrico County (Virginia) police officers were keeping surveillance over a suspected illegal gambling casino. At approximately 9:30 p.m., the officers observed petitioner and another male drive around the surveillance area in a suspicious fashion. After parking the car, petitioner and his companion stood beside the car drinking beer. Petitioner then took a pistol out of the car, concealed it in the waistband of his trousers, and began walking toward the gaming establishment. Because carrying a concealed weapon is a crime in Virginia, the officers stopped petitioner, removed a .32 caliber revolver from his waistband holster, and arrested him (Gov't Exh. 1; Tr. 5-8, 18-19, 25-26, 29-30, 35).

Petitioner stipulated to the fact that the firearm in question had previously been shipped in interstate commerce (Gov't. Exh. 7; Tr. 36). In addition, the



government introduced a certified copy of petitioner's 1961 felony conviction in Florida state court for breaking and entering with intent to commit a misdemeanor (Gov't. Exh. 4; Tr. 21-24). That conviction has never been overturned, and petitioner had not obtained a pardon or permission from the Secretary of the Treasury to possess firearms. See 18 U.S.C. App. 1203(2); 18 U.S.C. 925(c).

Shortly before trial, petitioner's counsel advised the court that he had information that petitioner had not been represented by counsel in his 1961 Florida trial. He contended that a conviction for violation of Section 1202(a)(1) could not be predicated on a prior conviction obtained in violation of petitioner's Sixth Amendment rights (A. 2-9).[1] The district court rejected this claim, ruling that the constitutionality of the Florida conviction was immaterial with regard to petitioner's status as a previously convicted felon for purposes of Section 1202(a)(1) (A. 9). Accordingly, petitioner did not present any evidence on whether in fact he had been convicted in 1961 without the aid of counsel.

2. On appeal, the court of appeals held that the accused may not collaterally attack a prior conviction as a defense to a prosecution under Section 1202(a)(1). The court concluded that the language and legislative history of Section 1202(a)(1) make clear

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[1] Petitioner's counsel further suggested that the Florida indictment under which petitioner had been tried was facially defective and that although petitioner was a juvenile (17 years old) at that time, he had been tried as an adult (A. 3-4).

that the statutory prohibition applies to all persons who have been convicted of a felony regardless of whether that conviction is subject to collateral attack (A. 14-18).[2] The court also rejected petitioner's contention that use of petitioner's prior uncounselled conviction as the predicate for a Section 1202(a)(1) prosecution would violate his Sixth Amendment right to counsel. Quoting from its earlier opinion in *United States* v. *Allen*, 556 F.2d 720, 723-724 (4th Cir. 1977),[3] the court observed (A. 18-19):

> Although *Burgett* [v. *Texas*, 389 U.S. 109 (1967); *United States* v.] *Tucker*, [404 U.S. 443 (1972);] and *Loper* [v. *Beto*, 405 U.S. 473 (1972),] established that a conviction in violation of the right to counsel is too unreliable to show guilt or enhance punishment under a recidivist statute, to form the basis for an increased sentence, or to be used to impeach general credibility, they do not say that a conviction in violation of *Gideon* [v. *Wainwright*, 372 U.S. 335 (1963)] is absolutely meaningless. The reliability of an indictment as an indication of probable cause to believe that a certain person has committed a crime does not depend on the presence of defense counsel * * *. Nor does the

[2] The court suggested that an exception might be appropriate where the conviction was facially invalid (A. 15).

[3] Although *Allen* involved a prosecution under 18 U.S.C. 922(a)(6) for making a false statement to a dealer in connection with the acquisition of a firearm, the court in the present case stated that "the quoted reasoning is equally applicable to either type of prosecution and has been generally so construed" (A. 17 n.7).



> absence of defense counsel or the lack of a waiver of the assistance of counsel render a prior felony conviction invalid or unreliable as an indication that the public interest requires that the convicted person's access to firearms be restricted when the conviction has not been reversed or vacated and the defendant remains unpardoned. We think that Congress is entitled to rely on a prior standing conviction as proof that there is probable cause to believe the convicted person has been involved in criminal activity and should not be able to buy a gun without first showing that he is no threat to public safety, even though the conviction may have been obtained in violation of *Gideon*.

Judge Winter dissented (A. 21-27). In his view, *Burgett* v. *Texas*, 389 U.S. 109 (1967), and its progeny bar the government from relying on petitioner's prior unconstitutional conviction as the basis for any prosecution (A. 23-24). Accordingly, Judge Winter concluded that Section 1202(a)(1) should be construed to permit collateral attacks based on the deprivation of the right to counsel in order to avoid rendering the statute unconstitutional (A. 21-23).

## SUMMARY OF ARGUMENT

The federal gun laws broadly prohibit persons who have been convicted of felonies from obtaining firearms. See 18 U.S.C. App. 1202(a)(1); 18 U.S.C. 922(d)(1), 922(g)(1), and 922(h)(1). Petitioner was convicted in Florida state courts of a felony in 1961. That conviction has never been overturned, and petitioner has never obtained a pardon (see 18

U.S.C. App. 1203(2)) nor received permission from the Secretary of the Treasury to possess a firearm (see 18 U.S.C. 925(c)). Petitioner nonetheless argues that his possession of a firearm in 1977 was lawful if his prior conviction was invalid under this Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). The courts below, however, correctly concluded that the alleged invalidity of a prior conviction is not a defense to a prosecution under Section 1202(a)(1), either as a matter of statutory construction or constitutional compulsion.

I

Section 1202(a)(1) unequivocally provides that "[a]ny person who * * * has been convicted * * * of a felony * * * [may not] receive[], possess[], or transport[] * * * any firearm * * *." No exception for persons whose outstanding convictions are allegedly invalid appears either in the sweeping language of the statute or in the express enumeration of exceptions contained in Section 1203. That omission is particularly indicative of congressional intent, since Congress has elsewhere specifically provided that the defendant may challenge the validity of his prior conviction in the course of a subsequent criminal case, when it has thought it appropriate to allow such a defense. See 18 U.S.C. 3575(e); 21 U.S.C. 851(c)(2). Accordingly, as nearly every court of appeals has recognized, Section 1202(a)(1) imposes a firearm disability upon the fact of conviction regardless of its validity. Thus, a convicted felon who wishes to possess a firearm lawfully must first have his con-



viction overturned (or otherwise obtain relief in accordance with the statute); he cannot simply ignore the fact of his conviction as petitioner did.

The legislative history and the purpose of Section 1202(a)(1) show that an allegedly invalid conviction may serve as the predicate for a prosecution under that provision. Senator Long, who introduced and sponsored Section 1202(a)(1) as a last minute floor amendment to the Omnibus Crime Control and Safe Streets Act of 1968, repeatedly emphasized the sweeping nature of his provision and stated that his bill would ensure that "the fact that anybody * * * has been convicted of a felony" would result in a firearm disability. 114 Cong. Rec. 13868 (1968). In addition, the legislative history as a whole demonstrates a strong congressional intent to stop the flow of firearms to any person with a criminal record or other objective characteristic that might indicate a propensity to misuse firearms. That purpose would be defeated if Section 1202(a) is construed to permit otherwise disabled persons to attack the validity of their disabling characteristic (such as a conviction, dishonorable discharge, or commitment to a mental institution) *after* such persons have obtained a firearm rather than before, as contemplated by Congress. See 18 U.S.C. 925(c); 18 U.S.C. App. 1203(2).

That Section 1202(a)(1) applies to all felons regardless of the validity of their prior conviction is further evidenced by the structure of the entire Omnibus Act. Like Section 1202(a)(1), Sections 922(g)(1) and 922(h)(1) impose a firearm disability on all con-

victed felons. In addition, those provisions also prohibit any person from receiving or transporting a firearm while under indictment for a felony, even if that person is subsequently acquitted or the indictment is dismissed. It is thus readily apparent that Congress could not have "intended to impose no disability on persons with outstanding convictions that they assert are unconstitutional, but to impose a disability on persons under indictment," particularly since in most instances a person whose conviction is overturned would still be under indictment. *United States* v. *Graves*, 554 F.2d 65, 72 (3d Cir. 1977) (en banc). Thus, the construction for which petitioner contends would produce an irrational result at war with the basic objectives of the Act.

Moreover, petitioner's construction of Section 1202(a)(1) would substantially undermine the effectiveness and purpose of various other regulatory provisions in the Omnibus Act. For example, the logic of petitioner's position suggests that a felon who believed his conviction to be invalid could lawfully lie about the fact of his conviction to a firearm dealer in connection with the acquisition of a firearm—clearly not a result intended by Congress. See 18 U.S.C. 922(a)(6), 922(d)(1). Furthermore, permitting a defendant to attack his prior conviction collaterally as a defense to a federal firearm prosecution would tend to encourage circumvention of the administrative preclearance scheme established by Congress in Section 925(c).



In sum, the language, legislative history, and structure of the Omnibus Act unambiguously demonstrate that an allegedly invalid prior conviction may be used as the basis for a firearm prosecution. Accordingly, there is no "fairly possible" construction of Section 1202(a)(1) that avoids the constitutional question raised by petitioner. See, *e.g.*, *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977). Similarly, in the absence of any grievous ambiguity in the statutory language, there is no occasion to apply the rule of lenity. See, *e.g.*, *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7.

## II

The court of appeals also correctly rejected petitioner's constitutional challenge to his conviction. We note at the outset that although this is a criminal case, what is really at issue here is the constitutional power of Congress to impose a *civil* firearms disability as a consequence of any felony conviction, even if the defendant has been denied the right to representation by counsel at his felony trial. Criminal consequences attach only when the defendant has eschewed the various legal remedies available to remove the disability and has flouted the statutory prohibition. If the civil disability is valid, then it cannot reasonably be maintained that Congress may not employ criminal sanctions to punish disobedience thereof.

The firearm regulatory scheme at issue here unquestionably bears a rational relationship to the legitimate governmental interest in public safety.. The

express findings in Section 1201 and the legislative history reflect Congress' awareness of the substantial nexus between the rise in violent crime and the easy availability of guns to "criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner." 114 Cong. Rec. 16298 (1968) (remarks of Rep. Pollock). Thus, just as Congress constitutionally imposed a firearm disability upon the fact of indictment, dishonorable discharge, or commitment to an institution, so too Congress could impose a disability on the fact of conviction. Certainly, an uncounselled conviction is no less reliable an indicator of a person's potential danger to society than an indictment, and the availability of judicial relief from the conviction or administrative relief pursuant to Section 925(c) eliminates the possibility of unfairness in particular cases.

Nothing in the Sixth Amendment bars use of an uncounselled conviction as the predicate for imposition of a firearm disability, enforcible by criminal penalties. To be sure, an uncounselled felony conviction may not be reliably used to enhance a subsequent sentence (see *Burgett* v. *Texas*, 389 U.S. 109 (1967); *United States* v. *Tucker*, 404 U.S. 443 (1972)) or to impeach a defendant's credibility (see *Loper* v. *Beto*, 405 U.S. 473 (1972)). But the reliability of the individual conviction is irrelevant to a Section 1202(a)(1) prosecution, and the Court has refused to hold that an uncounselled conviction is invalid for all purposes. See, *e.g.*, *Scott* v. *Illinois*, No. 77-1177



(Mar. 5, 1979). To the contrary, the Court has clearly indicated that a convicted felon may not simply ignore or lie about the fact of his prior conviction—precisely what petitioner is attempting to do here. See *Loper* v. *Beto*, *supra*, 405 U.S. at 482 n.11.

Moreover, in *Burgett* and its progeny the prior conviction did not become relevant until the time of the second trial. Accordingly, the Court allowed the defendant to challenge the validity of his conviction at that time. The *Burgett* line of cases is thus not controlling here, since the federal firearms laws impose a disability immediately upon the event of conviction. Accordingly, the court of appeals properly concluded that a felon who wants to possess a firearm lawfully must challenge the validity of his conviction or obtain a pardon or administrative relief prior to acquiring the firearm.

## ARGUMENT

The federal gun laws prohibit persons who have previously been convicted of a felony from receiving, possessing or transporting firearms. See 18 U.S.C. 922(g)(1), 922(h)(1), and App. 1202(a)(1); *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 3 5. This case presents the question whether a defendant may challenge the validity of his prior felony conviction as a defense to a prosecution for unlawfully possessing a firearm in violation of Section 1202(a)(1).[4]

[4] There appears to be no significant difference among Sections 922(g)(1), 922(h)(1), and 1202(a)(1) with regard to

As we demonstrate below, the language, legislative history, and purpose of Section 1202(a)(1) compel the conclusion that Congress intended to keep firearms out of the hands of every person who has been convicted of a felony regardless of the validity of that conviction, until such time as the felon either successfully overturns his conviction, obtains a qualifying pardon, or receives administrative relief from the Secretary of the Treasury (see 18 U.S.C. 925 (c); App. 1203(2)). Petitioner pursued none of these remedies and cannot now collaterally attack his prior felony conviction.

Furthermore, application of Section 1202(a)(1) to persons whose prior convictions were allegedly obtained without the aid of an attorney does not violate the Constitution. As petitioner apparently concedes, Congress' decision to impose a firearm dis-

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the issue posed by this case. These provisions were simultaneously enacted by Congress in separate titles of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 225-235, 236-237, as modified by the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213-1226, 1236. Section 1202(a)(1) differs substantially in scope from Sections 922(g)(1) and (h)(1) (see *United States* v. *Batchelder, supra*, slip op. 3-6 & n.7), but the pertinent language of the three provisions is virtually identical insofar as each section imposes a firearm disability on any individual who has been convicted of a crime punishable by imprisonment for a term exceeding one year. See 18 U.S.C. 921(a)(20), 922(g)(1), 922(h)(1), App. 1202(a)(1) and App. 1202(c)(2). (Section 921(a)(20) exempts antitrust violators and the like, whereas Section 1202 does not). Accordingly the decision of the Court in this case will likely resolve the issue presented here for purposes of all three statutes.



ability on all felons without regard to the constitutionality of the predicate conviction constitutes a rational classification that does not violate the Fifth Amendment. Moreover, the Sixth Amendment right to counsel does not bar recognition of the fact of an uncounselled conviction in this context.

## I. SECTION 1202(a)(1) PROHIBITS A FELON FROM POSSESSING A FIREARM EVEN IF THE PREDICATE FELONY IS OTHERWISE SUBJECT TO COLLATERAL ATTACK

### A. The Language, Legislative History, And Purpose Of Section 1202(a)(1) Demonstrate That The Alleged Invalidity Of The Prior Conviction Is Not A Defense To A Prosecution Under That Provision

1. As this Court has repeatedly observed, the "starting point in every case involving the construction of a statute is the language itself." *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979), slip op. 6 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)); see, *e.g.*, *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 7; *Reiter* v. *Sonotone Corp.*, No. 78-690 (June 11, 1979), slip op. 3-4. Section 1202(a)(1) unambiguously declares that "[a]ny person who * * * has been convicted by a court of the United States or of a State * * * of a felony * * *" may not receive, possess, or transport a firearm that has traveled in or affected commerce. Since no modifier restricts the scope of the term "convicted," "[n]othing on the face of the statute suggests a congressional intent

to limit its coverage to persons [whose convictions are not subject to collateral attack]." See *United States* v. *Culbert*, 435 U.S. 371, 373 (1978); see also *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 3.[5] Rather, as the courts of appeals have almost uniformly recognized, the plain meaning of this sweeping statutory language is that the fact of conviction imposes a firearm disability on all felons until such time as their convictions are overturned or they are relieved of the disability by other affirmative action (A. 14-17). See, *e.g.*, *Barker* v. *United States*, 579 F.2d 1219, 1226 (10th Cir. 1978) (construing Section 922(h)(1)); *United States* v. *Maggard*, 573 F.2d 926, 928 (6th Cir. 1978); *United States* v. *Graves*, 554 F.2d 65, 69 (3d Cir. 1977) (en banc); *United States* v. *Samson*, 533 F.2d 721, 722 (1st Cir.), *cert. denied*, 429 U.S. 845 (1976); *United States* v. *Williams*, 484 F.2d 428 (8th Cir. 1973); *United States* v. *Liles*, 432 F.2d 18, 20-21 (9th Cir. 1970). See also *Barrett* v. *United States*, 423 U.S. 212, 218 (1976). But see *Dameron* v. *United States*, 488 F.2d 724, 727 (5th Cir. 1974).[6]

[5] The thrust of petitioner's argument in this Court is only that uncounselled convictions may not serve as the predicate felony conviction under Section 1202(a)(1). In the district court, however, petitioner attempted to impeach his prior conviction on various grounds. See note 2, *supra*. As a matter of statutory language, if Section 1202 permits collateral attacks on the predicate felony on the ground of lack of counsel, it would permit such attack on any other ground that would support relief under 28 U.S.C. 2254 or 2255.

[6] Section 1201, which contains Congress' express findings and declarations on the problem of firearm abuse by "felons" and other irresponsible persons, also reflects an expansive legislative approach.



Moreover, the express enumeration of exceptions to Section 1202(a)(1) found in Section 1203 refutes the proposition that the alleged invalidity of the predicate felony conviction is a defense to a Section 1202(a)(1) prosecution. Section 1203 exempts certain limited categories of "convicted" felons from the broad coverage of Section 1202(a)(1), including persons who have received a qualifying pardon. 18 U.S.C. App. 1203(2).[7] No exception is made, however, for persons whose outstanding convictions are for any reason invalid. In accordance with the ancient maxim of *expressio unius est exclusio alterius*, judicial creation of another exception is therefore unwarranted. See, *e.g.*, *Huddleston* v. *United States*, 415 U.S. 814, 822 (1974); *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Ford* v. *United States*, 273 U.S. 593, 611 (1927); *Hyland* v. *Fukuda*, 580 F.2d 977, 980 (9th Cir. 1978). In our view, this particular omission is especially indicative of congressional intent, since other federal statutes involving prior convictions explicitly permit the accused to challenge the validity or constitutionality of the predicate felony as a defense. See Section 411

[7] The pardon must specify that the felon may possess firearms. Section 1203 also immunizes prison inmates who have been authorized to carry a gun by a prison official. 18 U.S.C. App. 1203(1). In addition, Congress precisely defined "felony" to exclude certain state crimes punishable by no more than two years imprisonment. 18 U.S.C. App. 1202(c)(2).

(c)(2) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 851(c)(2) (recidivist statute); 18 U.S.C. 3575(e) (special dangerous offender statute).[8]

2. Section 1202 was enacted as part of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 236-237 ("Omnibus Act").[9] Because Title VII was added as a last-minute floor amendment to the Omnibus Act, it is not discussed in the legislative reports. See *United States* v. *Batchelder*, *supra*, slip op. 5; *Scarborough* v. *United States*, 431 U.S. 563, 569-570 & n.9 (1977); *United States* v. *Bass*, 404 U.S. 336, 344 & n.11 (1971). Nothing in the legislative debates regarding Title VII even faintly suggests, however, that Congress intended to permit a felon accused of violating Section 1202(a)(1) to raise the alleged invalidity of his prior conviction as a defense. (The extensive legislative history accompanying Sections 922(g)(1) and 922(h)(1) is similarly bereft of any support

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[8] 18 U.S.C. 3575(e) was enacted as part of Title X of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 82 Stat. 949. Title XI of that same statute concerns explosives. Like Sections 922(g)(1) and 922(h)(1) from which it is derived, Title XI unambiguously prohibits any person under indictment for or convicted of a felony to ship or transport an explosive. See 84 Stat. 955, 18 U.S.C. 842(i).

[9] Title VII was meant to "complement" and "add to" the more comprehensive gun legislation contained in Title IV of the Omnibus Act. 114 Cong. Rec. 14774, 16286 (1968); see *United States* v. *Batchelder*, *supra*, slip op. 5-6; *Scarborough* v. *United States*, 431 U.S. 563, 573 (1977). See pages 24-32, *infra*.



for petitioner's position.) To the contrary, whatever relevant legislative history there is reflects a congressional intent to impose a firearm disability on all felons based on the fact of conviction.

For example, Senator Long, who introduced and managed passage of Title VII, observed that under his bill "the fact that anybody * * * has been convicted of a felony" would thereafter preclude that person from possessing a firearm. 114 Cong. Rec. 13868 (1968). As Senator Long further explained on several occasions:

> When a man has been convicted of a felony, unless—as this bill sets forth—he has been expressly pardoned by the President and the pardon states that the person is to be permitted to possess firearms in the future, that man would have no right to possess firearms. He would be punished criminally if he is found in possession of them.
>
> * * * * *
>
> What [Title VII] seeks to do is to make it unlawful for a firearm * * * to be in the possession of a convicted felon who has not been pardoned and who has therefore lost his right to possess firearms. * * *
>
> * * * * *
>
> So, under Title VII, every citizen could possess a gun until the commission of his first felony. Upon his conviction, however, Title VII would deny every assassin, murderer, thief and burglar of the right to possess a firearm in the future except where he has been pardoned by the President or a State Governor and has been

expressly authorized by his pardon to possess a firearm.

*Id.* at 13868, 14773. See also *id.* at 13869, 14774. These remarks evince Congress' understanding that the incidence of conviction automatically and without exception results in the forfeiture of the right to possess firearms.[10]

We further note that petitioner's cramped construction of Section 1202(a)(1) seems squarely inconsistent with the general thrust of the legislative policy revealed by the history of Title VII. That statute (as well as Title IV of the Omnibus Act) was enacted in response to the precipitous rise in political assassinations, riots and other violent crimes involving guns that occurred in this country in the 1960's. See, *e.g.*, S. Rep. No. 1097, 90th Cong., 2d Sess. 76-78 (1968); H.R. Rep. No. 1577, 90th Cong.,

[10] Senator Long was, of course, the sponsor and floor manager of the bill and his statements are entitled to particular weight. See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 13 (1978). Moreover, his broad view of the purpose and effect of Section 1202(a) is reflected in the comments and questions of other congressmen. See, *e.g.*, 114 Cong. Rec. 14774 (1968) (exchange of Sens. Long and McClellan); *id.* at 16286 (Rep. Machen); *id.* at 16293 (Rep. Boland); *id.* at 16296 (Rep. Randall) (noting that the provision might work a hardship as to dishonorably discharged veterans (Section 1202(a)(2)) since they might have rehabilitated themselves but not yet have obtained a pardon). See also *id.* at 21788 (Rep. Casey) (observing that with regard to 18 U.S.C. 924(c) "the only thing that would have to be proved [is] his conviction * * * and that a gun was used that had been in interstate commerce"); *id.* at 13220 (remarks of Sen. Tydings) ("any person who has a criminal record").



2d Sess. 7 (1968); S. Rep. No. 1501, 90th Cong., 2d Sess. 22-23 (1968); 114 Cong. Rec. 13868-13869, 14773-14774, 16285-16296 (1968). Given this historical context, it is not surprising that Congress took an expansive approach to keeping firearms away from "criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner." *Id.* at 16298 (Rep. Pollock).[11] As this Court concluded in *Scarborough* v. *United States*, *supra*, 431 U.S. at 572, "[t]he legislative history [of Title VII] in its entirety, while brief, further supports the view that Congress sought to rule broadly—to keep guns out of the hands of those who have demonstrated that 'they may not be trusted to possess a firearm without becoming a threat to society.'" Concomitantly, the legislative debates are completely devoid of any suggestion that Congress intended to permit the accused to raise belatedly the validity of his prior conviction as a defense to possessing a gun while still a "convicted" felon. In these circumstances, there is no basis for creating a loophole in the broad statutory scheme enacted by Congress. See *United States* v. *Naftalin*, *supra*, slip op. 8; *Huddleston* v. *United States*, *supra*, 415 U.S. at 825.

3. In addition, limiting the application of Section 1202(a)(1) to validly convicted felons would

[11] Senator Long similarly observed that Title VII applies to "persons who, by their actions, have demonstrated that they are dangerous, *or that they may become dangerous.*" 114 Cong. Rec. 14773 (1968) (emphasis supplied).

"bring about an end completely at variance with the purpose of the statute." *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 315 (1953); *United Steelworkers* v. *Weber*, No. 78-432 (June 27, 1979), slip op. 6. As evidenced by the language and legislative history of Section 1202(a)(1) detailed above, Congress sought to control the incidence of violent crime by "maximiz[ing] the possibility of keeping firearms out of the hands of [potentially irresponsible] persons." 114 Cong. Rec. 21784 (1968) (remarks of Rep. Celler). See, *e.g.*, *id.* at 16298; *Hyland* v. *Fukuda*, *supra*, 580 F.2d at 980; *United States* v. *Graves*, *supra*, 554 F.2d at 74; *United States* v. *Liles*, *supra*, 432 F.2d at 20. Congress not only prohibited any person who has been convicted of a felony from possessing a firearm, but it also imposed a similar disability on any person who has been dishonorably discharged from the army,[12] who has been adjudged a mental incompetent,[13] who has renounced his citizenship,[14] or who is an unlawful alien.[15]

Thus, Congress enacted Section 1202(a) as a sweeping prophylaxis against misuse of firearms.

[12] See 18 U.S.C. App. 1202(a)(2).

[13] See 18 U.S.C. App. 1202(a)(3).

[14] See 18 U.S.C. App. 1202(a)(4). In promoting Title VII, Senator Long stated that Lee Harvey Oswald, President Kennedy's assassin, was both dishonorably discharged from the army (Section 1202(a)(2)) and an expatriate (Section 1202(a)(4)). See 114 Cong. Rec. 13868 (1968).

[15] See 18 U.S.C. App. 1202(a)(5).



See, *e.g.*, *United States* v. *Graves*, *supra*, 554 F.2d at 70. That purpose would be substantially undermined if, as petitioner contends, the various types of potentially dangerous people set forth in Section 1202(a) [16] could attack the validity of their disabling characteristic *after* the fact of possessing, receiving or transporting a firearm rather than before, as contemplated by Congress.[17] The effectiveness of the expansive regulatory scheme contained in Section 1202(a) depends in large measure on the breadth and certainty of the categories of disabled persons. Petitioner's construction of Section 1202(a)(1), however, would severely limit the prophylactic impact of Section 1202(a) in two ways. First, a person whose conviction (or discharge, etc.) was in fact invalid for any reason would not be prohibited from possessing a firearm, even though Congress reasonably "believed that a person with an outstanding felony conviction, even one that has been attacked as unconstitutional, may be somewhat more likely than the average citizen to utilize a gun improperly." *United States* v. *Graves*, *supra*, 554 F.2d at 70. Further, permitting a defendant to raise the validity of his disability at the trial of the firearms violation would tend to en-

[16] We are unable to discern any difference among the subsections of Section 1202(a) with regard to the statutory issue posed by this case. If petitioner is correct about the interpretation of Section 1202(a)(1), it seemingly follows that dishonorably discharged veterans and mental incompetents could also collaterally challenge the discharge or commitment as a defense to a prosecution under Section 1202(a).

[17] See pages 32-35, 44-45, *infra*.

courage convicted felons, who otherwise fall within the plain terms of the statute, to bypass the legal remedies available to remove the disability and to judge for themselves whether their prior convictions are possibly invalid and, consequently, whether they may possess a firearm.

### B. Examination Of The Complete Structure Of The Federal Gun Laws Demonstrates That An Invalid Felony Conviction May Serve As The Predicate For A Prosecution Under Section 1202(a)(1)

It is well settled that "courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions * * *." *United States* v. *Bass*, *supra*, 404 U.S. at 344. See, e.g., *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 11. The language, legislative history, and purpose of Title VII discussed above demonstrate that the invalidity of a prior felony conviction is not a defense to a prosecution under Section 1202(a)(1). The structure of Title IV of the Omnibus Act, which was enacted simultaneously with Title VII,[18] reinforces that conclusion.[19]

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[18] See Pub. L. No. 90-351, 82 Stat. 225-235, 236-237.

[19] To be sure, the Court has previously indicated that it is not very meaningful to compare Title VII with Title IV in considering the interstate commerce nexus requirements of those statutes. See *Scarborough* v. *United States*, *supra*, 431 U.S. at 569. More recently, however, the Court has expressly recognized that in other contexts a comparison of the two titles may well illuminate the meaning and proper construction of these two overlapping gun control provisions. See



1. Like Title VII, Title IV prohibits various categories of presumptively dangerous persons from transporting and receiving firearms. 18 U.S.C. 922(g) and 922(h).[20] In particular Sections 922(g)(1) and 922(h)(1) impose a firearm disability on "any person * * * who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Thus, with regard to the statutory question at issue here, there is no significant difference between Title IV and Title VII. Both statutes seek to keep firearms away from "any person * * * who has been convicted * * *" of a felony.[21] Accordingly, if petitioner's con-

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*United States* v. *Batchelder*, *supra*, slip op. 6 n.7. Application of the rule of *in pari materia* is particularly appropriate in this case, since the two titles were enacted together as complementary provisions, serve the same general function, and most important, contain virtually identical language with regard to the issue contested here. See, *e.g.*, *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-245 (1972); *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939).

[20] Title VII also prohibits mere possession. While the categories of disabled persons under the two statutes overlap, there are substantial differences. For example, only Title IV applies to "fugitive[s] from justice" and "addicts," whereas only Title VII covers dishonrable dischargees from the armed services, expatriates, and illegal aliens. Compare 18 U.S.C. 922(g)(2)-(3) and 922(h)(2)-(3) with 18 U.S.C. App. 1202(a)(2), 1202(a)(4), and 1202(a)(5). The differences and similarities between the two statutes have been canvassed in detail in the government's brief in *United States* v. *Batchelder*, at 15-22 (No. 78-776, 1978 Term), a copy of which has been sent to petiitoner.

[21] The definition of felony in Title IV is somewhat different, in reports not material here, from that contained in Title VII. Title IV exempts antitrust violations and the like

struction of Section 1202(a)(1) is correct, presumably an accused may also challenge the validity of his prior conviction under Sections 922(g)(1) and 922(h)(1).[22]

But it is immediately apparent that limiting the scope of Sections 922(g)(1) and (h)(1) to validly convicted felons is completely at odds with the statutory scheme as a whole. Sections 922(g)(1) and (h)(1) not only impose a disability on a convicted felon but also on a person who is under indictment for a felony, even if that person is subsequently acquitted of the felony charge. See, *e.g.*, *United States* v. *Pricepaul*, 540 F.2d 417, 421 (9th Cir. 1976); *DePugh* v. *United States* 393 F.2d 367 (8th Cir.), cert. denied, 393 U.S. 832 (1968); H.R. Conf. Rep. No. 1956, 90th Cong., 2d Sess. 30 (1968); S. Rep. No. 1097, 90th Cong., 2d Sess. 112 (1968); H.R. Rep. No. 1577, 90th Cong., 2d Sess. 11 (1968). See also 18 U.S.C. 925(b) (licensed gun dealer may continue to deal in guns despite Sections 922(g)(1) and (h)(1) "until any conviction pursuant to the indictment becomes final"); 18 U.S.C. 845 (b). Since Congress made the fact of indictment a disabling circumstance,

(18 U.S.C. 921(a)(20)) and Title IV covers felonies in any court (*i.e.*, possibly foreign ones), whereas Title VII specifically applies to federal and state courts.

[22] The Court's construction of Section 1202(a)(1) will also be dispositive of the proper application of Title XI of the Organized Crime Control Act of 1970, 18 U.S.C. 841 *et seq.*, which imposes a similar disability on convicted felons and indictees with regard to explosive materials. See 18 U.S.C. 842(i).



a fortiori the fact of conviction also deprives a person of the right to handle firearms. As the en banc Third Circuit concluded in *United States* v. *Graves*, *supra*, 554 F.2d at 72, "[t]o argue * * * that Congress intended to impose no disability on persons with outstanding convictions that they assert are unconstitutional, but to impose a disability on persons under indictment, would be to charge the legislative framers with a manifest inconsistency."

For example, except in the unusual circumstance that the defect in the conviction affects the validity of the indictment,[23] a person who successfully challenges his prior conviction will still be under indictment.[24] Holding that such a defendant may challenge his prior invalid conviction as a defense to the firearm prosecution would ascribe to Congress one of the following irrational purposes: Either the unconstitutionally convicted defendant is still guilty of violating Title IV because he is considered to have been under indictment at the time he received or transported a firearm—in which case the defense is a time-consuming illusion; or the defendant goes free because he was neither under indictment nor validly

[23] Thus, if a conviction is invalid because the indictment was fatally defective or because prosecution was improper on such grounds as double jeopardy or speedy trial, the indictment will be dismissed.

[24] Under federal practice and most state practices, including Florida, the defendant can be retried on the original indictment where, for instance, he was not represented by counsel.

convicted at the time in question—in which case persons who have lost the presumption of innocence as a result of an (invalid) conviction are rendered more trustworthy than persons under indictment who by definition are presumed innocent. Cf. *Bell* v. *Wolfish*, No. 77-1829 (May 14, 1979), slip op. 11-15; *Johnson* v. *Zerbst*, 304 U.S. 458, 468 (1938) (conviction "carries with it a presumption of regularity").[25]

2. Title IV constitutes a comprehensive gun control scheme that seeks "broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, *supra*, 423 U.S. at 218; see *Huddleston* v. *United States*, *supra*, 415 U.S. at 824. At the core of Title IV are various regulatory and licensing provisions. See 18 U.S.C. 922, 923. As we now demonstrate, petitioner's interpretation of Sections 922(g), 922(h), and 1202(a) would substantially limit the effectiveness of this regulatory scheme and thereby

[25] Both invalidly convicted felons and indictees may ultimately vindicate their innocence. But as between the two groups, it is beyond dispute that the latter, who are presumed innocent, are certainly not more presumptively dangerous than the former, who have been convicted, albeit invalidly. Thus, Congress could not rationally have imposed a disability on indictees until such time as they successfully defend themselves but not have imposed a similar disability on convicted felons until such time as they succeed in having their conviction reversed. Cf. *United States* v. *Naftalin*, *supra*, slip op. 5 ("There is, therefore, 'no warrant for narrowing alternative provisions which the legislature has adopted with the purpose of affording added safeguards.' ").



subvert the congressional purpose underlying Title IV.

Each person engaged in the business of importing, manufacturing, transporting, selling or otherwise dealing with firearms must procure a federal license. 18 U.S.C. 923, 922(a)-922(c). Federal licensees are obligated to keep detailed records of all their transactions. See 18 U.S.C. 922(b)(5), 922(c), 922(m), 923(g). In particular, every person who wishes to purchase a firearm from a dealer must fill out a special form that mandates disclosure of various information including disabling characteristics, such as a prior conviction or commitment to a mental institution. See, *e.g.*, *Huddleston* v. *United States*, *supra*, 415 U.S. at 816; *United States* v. *Allen*, 556 F.2d 720 (4th Cir. 1977); *United States* v. *Ransom*, 545 F.2d 481 (5th Cir.), cert. denied, 434 U.S. 908 (1977); *Cassity* v. *United States*, 521 F.2d 1320 (6th Cir. 1975).[26] It is a crime to make a false statement on

[26] Question 8 of Treasury Department (Bureau of Alcohol, Tobacco and Firearms) Form 4473 provides:

> 8. CERTIFICATION OF TRANSFEREE (*Buyer*)—An untruthful answer may subject you to criminal prosecution. Each question must be answered with a "yes" or a "no" inserted in the box at the right of the question.
>
> a. Are you under indictment or information* in any court for a crime punishable by imprisonment for a term exceeding one year? * *A formal accusation*

these forms (18 U.S.C. 922(a)(6)), and dealers are prohibited from transferring a firearm to anyone they

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*of a crime made by a prosecuting attorney, as distinguished from an indictment presented by a grand jury.*

b. Have you been convicted in any court of a crime punishable by imprisonment for a term exceeding one year? (Note: The actual sentence given by the judge does not matter—a yes answer is necessary if the judge could have given a sentence of more than one year. Also, a "yes" answer is required if a conviction has been discharged, set aside, or dismissed pursuant to an expungement or rehabilitation statute.)

c. Are you a fugitive from justice?

d. Are you an unlawful user of, or addicted to, marijuana, or a depressant, stimulant, or narcotic drug?

e. Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?

f. Have you been discharged from the Armed Forces under dishonorable conditions?

g. Are you an alien illegally in the United States?

h. Are you a person who, having been a citizen of the United States, has renounced his citizenship?

I hereby certify that the answers to the above are true and correct. I understand that a person who answers any of the above questions in the affirmative is prohibited by Federal law from purchasing and/or possessing a firearm. I also understand that the making of any false oral or written statement or the exhibiting of any false or misrepresented identification with respect to this transaction is a crime punishable as a felony.

TRANSFEREE'S (*Buyer's*) SIGNATURE
DATE



have reasonable cause to believe may not lawfully receive a firearm (18 U.S.C. 922(d)).[27]

The effect of these simple prohibitions on the flow of firearms would be severely circumscribed if the Omnibus Act is construed to disable only those persons whose status as a felon, mental defective, dishonorable discharge, fugitive from justice, etc., is not subject to collateral attack. Thus, even a validly convicted felon could relieve a dealer of criminal responsibility for selling a firearm to a felon by stating that he believed his prior conviction to be unconstitutional. And it is at least arguable that if Sections 1202(a)(1), 922(g)(1), and 922(h)(1) apply to validly convicted felons only, then a convicted felon may lie about the fact of his prior conviction without fear of violating Section 922(a)(6). Cf. *United States* v. *Pricepaul, supra*, 540 F.2d at 420. But compare *Dameron* v. *United States*, 488 F.2d 724 (5th Cir. 1974), with *United States* v. *Ransom, supra.*[28] In

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[27] 18 U.S.C. 924(a) imposes a maximum penalty of up to five years' imprisonment or a $5,000 fine, or both, for violation of Sections 922(a)(6) and 922(d). Title XI of the Organized Crime Control Act of 1970 constitutes a virtually identical statutory scheme designed to stem the flow of explosive materials to dangerous persons. See 18 U.S.C. 842(a)(2) (false statement prohibition), 842(d) (dealer prohibition), 842(i) (dangerous persons categorized). Title XI provides a greater maximum penalty, however. See 18 U.S.C. 844(a) ($10,000 and 10 years' imprisonment).

[28] The Ninth Circuit alone has concluded that Section 922(a)(6) is not violated if a purchaser of a firearm fails to disclose the fact of his prior uncounselled conviction. See *United States* v. *Pricepaul, supra.* The court reached that

short, petitioner's construction of the Act would thwart Congress' regulatory design.

3. If an invalidly convicted felon had no means to establish his right to possess firearms other than challenging his status in the course of the firearm prosecution, then perhaps this Court might be justified in formulating such a defense despite the language, legislative history, purpose and structure of the gun control laws limned above. In fact, however, the Omnibus Act encompasses at least three avenues of prospective relief from the disability imposed by Sections 1202(a)(1), 922(g)(1) and 922(h)(1). Thus, prior to obtaining a firearm, petitioner could have—and, in our view, should have—challenged his prior conviction in a coram nobis proceeding in Florida state courts. See, *e.g.*, Fla. Const. art. 5, § 5; *Weir* v. *State*, 319 So. 2d 80 (Fla. 2d Dist. Ct. App. 1975); *L'Hommedieu* v. *State*, 362 So. 2d 72 (Fla. 2d Dist. Ct. App. 1978).[29] In addi-

result as a matter of constitutional law, however, and not a construction of the Act. 540 F.2d at 420-421. Various other courts of appeals have concluded that Section 922(a)(6) prohibits even an invalidly convicted felon from lying about the fact of conviction. See, *e.g.*, *United States* v. *Graves*, *supra*; *United States* v. *Allen*, 556 F.2d 720 (4th Cir. 1977); *United States* v. *Ransom*, *supra*; *Cassity* v. *United States*, *supra*; *United States* v. *Edwards*, 568 F.2d 68 (8th Cir. 1977).

[29] In many circumstances federal habeas corpus relief will be available under 28 U.S.C. 2254 and 2255. See *Carafas* v. *LaVallee*, 391 U.S. 234 (1968). Had petitioner done so successfully, he would, of course, still have been subject to possible trial and conviction on the charge.



tion to judicial relief, petitioner could also have sought a pardon from the Florida executive in accordance with Section 1203(2).[30] Finally, Section 925(c) provides that any person who has been convicted of a felony (except one involving use of a firearm) may apply to the Secretary of the Treasury for relief from the firearm restrictions imposed by the Omnibus Act.[31]

The existence of these remedies, two of which are expressly contained in the Omnibus Act itself, strongly suggests that Congress did not intend to permit the invalidity defense urged on the Court by petitioner. The relief procedures contemplated by Congress re-

[30] The pardon must specifically provide that the felon may thereafter use firearms.

[31] As evidenced by its reference to "possession" of firearms, Section 925(c) applies to Section 1202(a)(1) as well as to Sections 922(g)(1) and 922(h)(1). H.R. Conf. Rep. No. 1956, *supra*, at 33. See *United States* v. *Maggard*, *supra*, 573 F.2d at 928 n.1; *United States* v. *Graves*, *supra*, 554 F.2d at 72. The Secretary may "grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 U.S.C. 925(c). In 1978, 1,757 applications were filed and 574 were granted. Among the common reasons for denying an application are (1) the applicant is still on probation, (2) the applicant is barred from possessing firearms under state law, and (3) the applicant's prior crime involved use of a firearm. The Ninth Circuit has held that a rejected applicant may seek judicial review of an adverse decision. See *Kitchens* v. *Dept. of Treasury*, 535 F.2d 1197 (9th Cir. 1976) (arbitrary and capricious standard of review).

quire that the defendant clear his status *before* obtaining a firearm, thereby "broadly * * * keep[ing] firearms away from the persons * * * classified as potentially irresponsible and dangerous." *Barrett* v. *United States*, *supra*, 423 U.S. at 218; see also *Scarborough* v. *United States*, *supra*, 431 U.S. at 572. Petitioner's construction of the Act, on the other hand, would encourage convicted felons who wished to obtain firearms to guess whether or not their prior conviction was invalid. As a result, the prospective remedial schemes provided by the Omnibus Act will be bypassed and the bright line prohibition heretofore established by Sections 922(g)(1), 922(h)(1), and 1202(a)(1) will be clouded.

Moreover, letting a defendant challenge the validity of his prior conviction as a defense to a Section 1202(a)(1) prosecution will interfere with the administration of the gun control laws for still other reasons. The federal courts will be burdened by time-consuming collateral issues—issues that very often would have been more easily and more accurately resolved in state court, either because the essential records are kept in state court or because the issue of validity will involve questions of state procedural and substantive law.[32] Furthermore, where, as here,

[32] If Section 1202(a)(1) is construed to apply only to validly convicted felons, then presumably a convicted felon does not violate Section 1202(a)(1) if his prior conviction is subsequently overturned on direct appeal, even though he possessed a firearm while a convicted felon. But see *United States* v. *Liles*, *supra*. Such a construction would pose serious problems of judicial administration with regard to defendants whose prior convictions are on direct appeal at the time of the gun control prosecution. It would certainly be inappropriate for the trial court to prejudge the merits of the defendant's appeal. Thus, the district judge would either have to stay the gun control prosecution (possibly violating the Speedy Trial Act of 1974, 18 U.S.C. 3161 *et seq.*) or to proceed with a prosecution that may thereafter be rendered a nullity.



the conviction is decades old, there may be no records or only incomplete records regarding the predicate conviction. Accordingly, the government might well be unable to establish that the defendant was represented by counsel or waived the right to counsel even though in fact he was or he did. In such circumstances, the federal court may have little choice but to accept the uncontroverted allegation of the defendant and to acquit him. See *United States* v. *O'Neal*, 545 F.2d 85 (9th Cir. 1976); *United States* v. *Lufman*, 457 F.2d 165, 166-167 n.2 (7th Cir. 1972). The obvious potential for abuse and the concomitant disruption in the enforcement of the Omnibus Act are apparent.

### C. The Doctrines Of Avoidance Of Constitutional Questions And Lenity Do Not Justify Rewriting The Federal Gun Laws

1. *Avoidance of constitutional questions.* Because in petitioner's view the Sixth Amendment precludes use of an uncounselled felony conviction in a firearm prosecution (but see point IIA, *infra*), he contends (Br. 4) that Section 1202(a)(1) "should be read to avoid a construction that would render it unconstitu-

tional." See also A. 22-23 (Winter, J., dissenting).[33] To be sure, a court should construe a truly ambiguous statute to avoid a serious constitutional question. See, *e.g.*, *NLRB* v. *Catholic Bishop of Chicago*, No. 77-752 (Mar. 21, 1979), slip op. 9-11; *United States Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 571 (1973); *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971). But even assuming that petitioner's constitutional claims are substantial, the maxim relied on by petitioner has no application to this case.

"[R]esort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is 'fairly possible' or when the statute provides a 'fair alternative' construction." *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977); see *United States* v. *Batchelder*, *supra*, slip op. 7-8; *Shapiro* v. *United States*, 335 U.S. 1, 31 (1948); *United States* v. *Sullivan*, 332 U.S. 689, 693 (1948); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). The language and legislative history of Section 1202(a)(1) outlined above demonstrate unequivocally that Congress intended to keep firearms away from all convicted felons, even if their convictions should subsequently be adjudged invalid for any reason. Similarly, the purpose and structure of the federal gun

[33] Of course, petitioner's construction of the statutory language would allow any felon to attack the validity of his prior conviction as a defense to a firearm prosecution, even though the defect in the particular conviction did not raise constitutional questions. See note 5, *supra*.



laws as a whole show that petitioner's reconstruction of Section 1202(a)(1) is simply not "consistent with the will of Congress." *United States Civil Service Comm'n* v. *Nat'l Ass'n of Letter Carriers*, *supra*, 413 U.S. at 571. Accordingly, just as in *United States* v. *Batchelder*, *supra*, slip op. 7, "the maxim that statutes should be construed to avoid constitutional questions offers [petitioner] no assistance here."

2. *The principle of lenity.* This Court has often stated that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). See, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 14 (1978); *United States* v. *Bass*, *supra*, 404 U.S. at 347; *Bell* v. *United States*, 349 U.S. 81, 83 (1955). "This rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by deprivation of liberty or property." *Huddleston* v. *United States*, *supra*, 415 U.S. at 831. It is equally well-established, however, that the touchstone of the doctrine of lenity is the existence of a "grievous ambiguity or uncertainty in the language and structure of the [criminal statute in question]." *Ibid.*; see, *e.g.*, *United States* v. *Batchelder*, *supra*, slip op. 7; *Scarborough* v. *United States*, *supra*, 431 U.S. at 577; *Barrett* v. *United States*, *supra*, 423 U.S. at 217-218. No such ambiguity exists here.

Section 1202(a)(1) gives unambiguous notice to all convicted felons that they may not possess a firearm. Cf. *Huddleston* v. *United States*, *supra*, 415 U.S. at 831; *United States* v. *Batchelder*, *supra*, slip op. 7. Although the statute elsewhere makes exceptions for persons receiving a specific pardon (18 U.S.C. App. 1203(2)) and for persons obtaining preclearance from the Secretary of the Treasury (18 U.S.C. 925(c)), no exception appears for felons whose outstanding prior convictions are subject to collateral attack. In such circumstances, "there is no justification for indulging in uneasy statutory construction." *Barrett* v. *United States*, *supra*, 423 U.S. at 217. Moreover, the legislative history, statutory structure, and remedial purpose of the Act analyzed above manifest an unequivocal congressional intent to keep firearms from all persons who might be dangerous—including felons who may have been unconstitutionally convicted. See pages 18-35, *supra*. There is thus no occasion to apply the maxim of lenity, because "[e]ven penal laws * * * ought not to be construed so strictly as to defeat the obvious intention of the legislature." *American Fur Co.* v. *United States*, 27 U.S. (2 Pet.) 358, 367 (1829); see, *e.g.*, *United States* v. *Batchelder*, *supra*, slip op. 7; *Huddleston* v. *United States*, *supra*, 415 U.S. at 831; *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955); *United States* v. *Morris*, 39 U.S. (14 Pet.) 464, 475 (1840); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820).



## II. CONGRESS MAY CONSTITUTIONALLY BAR A CONVICTED FELON FROM POSSESSING A FIREARM EVEN IF THE PRIOR CONVICTION WAS OBTAINED WITHOUT THE AID OF COUNSEL

Our discussion in point I demonstrates that Congress intended to impose a firearm disability on persons with outstanding felony convictions, even if those convictions might be subject to collateral attack. We now turn to the question whether the firearm statutes thus enacted by Congress violate the Constitution. In our view, the critical question is whether Congress may impose a *civil* disability regarding possession of firearms on invalidly convicted felons. If, as we submit, that question is answered affirmatively, it then follows that Congress may attach criminal liability to those who ignore this civil bar, even if the prior conviction was obtained in violation of the Sixth Amendment.

### A. Equal Protection Concepts Do Not Preclude Congress From Imposing Firearm Disabilities Upon All Convicted Felons Regardless Of The Validity Of Their Prior Conviction

It is beyond dispute "that the concept of equal protection as embodied in the Due Process Clause of the Fifth Amendment * * * does not require that all persons be dealt with identically, but rather that there be some 'rational basis' for the statutory distinctions made * * * or that they 'have some relevance to the purpose for which the classification is made.'" *Marshall* v. *United States*, 414 U.S. 417, 422 (1974); see, *e.g.*, *New York City Transit Authority* v. *Beazer*, No. 77-1427 (Mar. 21, 1979), slip op. 23 n.39; *Vance*

v. *Bradley*, No. 77-1254 (Feb. 22, 1979), slip op. 4; *McGinnis* v. *Royster*, 410 U.S. 263, 270 (1973). Thus, the firearm regulatory scheme at issue here must be sustained as consonant with due process unless the classifications and procedures enacted by Congress bear no rational relationships to a legitimate governmental interest.[34] Section 1202(a)(1) readily meets that test.

The express congressional purpose in enacting Title VII is set forth in the statute itself:

> [T]he receipt, possession, or transportation of a firearm by felons * * * constitutes—(1) a burden on commerce or threat affecting the free flow of commerce, (2) a threat to the safety of the President of the United States and Vice President of the United States, (3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

[34] The "rational basis" test is applicable here because legislative reliance upon convict status is certainly not a suspect classification (see, *e.g.*, *DeVeau* v. *Braisted*, 363 U.S. 144, 157 (1960) (opinion of Frankfurter, J.); *McGinnis* v. *Royster*, *supra*) and the use of firearms does not trench upon any fundamental interest (see, *e.g.*, *United States* v. *Samson*, *supra*, 533 F.2d at 722; *United States* v. *Craven*, 478 F.2d 1329, 1339 (6th Cir.), cert. denied, 414 U.S. 866 (1973)). See also *Kentucky Whip & Collar Co.* v. *Illinois Cent. R.R.*, 299 U.S. 334 (1937); *Whitfield* v. *Ohio*, 297 U.S. 431 (1936); *Upshaw* v. *McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970).



18 U.S.C. App. 1201. Similarly, the legislative history of the gun control laws "evidences Congress' deep concern about the easy availability of firearms, especially to those who Congress has reason to believe pose a greater threat to community peace than does the public generally." *United States* v. *Liles*, *supra*, 432 F.2d at 20. See pages 19-22, *supra*. And in particular, Congress focused on the substantial nexus between violent crimes and the possession of firearms by "any person who has a criminal record." 114 Cong. Rec. 13220 (1968) (remarks of Sen. Tydings); see, *e.g.*, *id.* at 16298 (remarks of Rep. Pollock) ("criminals or other persons who have specific records or characteristics which raise serious doubt as to their probable use of firearms in a lawful manner").[35]

In light of the overwhelming evidence that felons as a group are more likely to use firearms unlawfully than the public as a whole, Congress rationally concluded that any felony conviction—even an allegedly invalid one—is a sufficient basis on which to prohibit the possession of firearms. See, *e.g.*, *United States* v. *Samson*, *supra*, 533 F.2d at 722; *United States* v. *Ransom*, 515 F.2d 885, 891-892 (5th Cir. 1975); *United States* v. *Andrino*, 497 F.2d 1103, 1108 (9th Cir.), cert. denied, 419 U.S. 1048 (1974); *United States* v. *Burton*, 475 F.2d 469, 471 (8th Cir.), cert. denied, 414 U.S. 835 (1973); *United*

[35] Senator Long, the sponsor of Title VII, noted that, for example, the assassins of Dr. Martin Luther King and civil rights worker Viola Liuzzo had prior criminal records. See 114 Cong. Rec. 14773 (1968).

*States* v. *Craven*, 478 F.2d 1329, 1339 (6th Cir.), cert. denied, 414 U.S. 866 (1973); *United States* v. *Thoresen*, 428 F.2d 654, 658-662 (9th Cir. 1970). Thus, even assuming that the fact of an uncounselled or otherwise invalid conviction is an unreliable indicator of a particular person's propensity to misuse firearms, Section 1202(a)(1) is not unconstitutional as applied to invalidly convicted felons. Overinclusive and imperfect legislative classifications do not violate the Due Process Clause, so long as the general classification bears some reasonable relationship to the legislative goal. See, *e.g.*, *New York City Transit Authority* v. *Beazer*, *supra*; *McGinnis* v. *Royster*, *supra*. And this Court has repeatedly recognized that a legislature may constitutionally prohibit convicted felons from engaging in activities far more fundamental than the right to possess firearms at issue here. See *Richardson* v. *Ramirez*, 418 U.S. 24 (1974) (disenfranchisement of felons); *DeVeau* v. *Braisted*, 363 U.S. 144, 157-160 (1960) (felons barred from waterfront employment); *Hawker* v. *New York*, 170 U.S. 189 (1898) (prohibition on medical practice by a felon).

Even if one ignored the fact that Congress was broadly distinguishing between the general population and convicted felons and considered only the subclass of unconstitutionality convicted persons, the imposition of a civil firearms disability on the latter group remains justifiable. Congress could rationally have concluded that persons who have been invalidly convicted nonetheless pose a sufficient threat



to public safety to justify the slight civil disability involved in this case. See, *e.g.*, *United States* v. *Graves*, *supra*, 554 F.2d at 69; *United States* v. *Samson*, *supra*, 533 F.2d at 723 ("the consequences of the deprivation are relatively slight compared with the gravity of the public interest sought to be protected"). Uncounselled convictions are, for example, reliable enough to serve as the basis for imposing a criminal fine—a more significant sanction than the minor civil incapacity created by Section 1202(a)(1). See *Scott* v. *Illinois*, No. 77-1177 (Mar. 5, 1979). Moreover, the fact of an uncounselled conviction, which represents the grand jury's or magistrate's finding of probable cause and the trier of fact's finding of guilt beyond a reasonable doubt, is at least as reliable an indicator of antisocial tendencies as the fact of indictment, commitment, dishonorable discharge, or deportability.[36] And just as

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[36] Due process and the Sixth Amendment require that the defendant be accorded various rights at trial and that his guilt be established beyond a reasonable doubt. In contrast, indictment requires only an ex parte finding of probable cause by the grand jury; the defendant has no right to appear before the grand jury, and, if he does testify, he has no right to counsel. *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976) (plurality opinion). Similarly, the Court has recently concluded that a civil commitment requires a lesser standard of proof than that necessary to convict. See *Addington* v. *Texas*, No. 77-5992 (Apr. 30, 1979). See also H.R. Conf. Rep. No. 1956, *supra*, at 30 (definition of commitment includes those committed by a commission or administrative tribunal). Furthermore, there is no right to jury trial or counsel in a dishonorable discharge proceeding (see 10 U.S.C. 1169; 32 C.F.R. Part 70) or in an immigration proceeding (8 U.S.C.

Congress may constitutionally impose substantial limitations on the activities of indictees, including arrest, incarceration and the restrictions attendant thereto, and various civil disabilities,[37] a fortiori it may constitutionally prohibit invalidly convicted felons—who, even if their convictions were considered void, would still stand indicted—from obtaining or possessing firearms.

Finally, we note that any doubts about the reasonableness of the felony classification contained in Section 1202(a)(1) must be resolved favorably in light of the existence of various remedies to remove the disability. The conviction may be set aside on collateral attack, the individual can be pardoned, and Section 925(c) permits the Secretary of the Treasury to make an individualized determination regarding the prospective use of firearms by a convicted felon. These civil remedies provide ample means of eliminating possible unfairness in particular cases. Cf. *Carter* v. *Gallagher*, 452 F.2d 315, 326 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972). In other words, if petitioner's uncounselled conviction had no bearing on his fitness to possess firearms—an unrealistic assumption given petitioner's substantial rec-

1252(b)(2); *Murgia-Melendrez* v. *INS*, 407 F.2d 207, 208-209 (9th Cir. 1969)).

[37] See, *e.g.*, *Bell* v. *Wolfish*, *supra*; *Gerstein* v. *Pugh*, 420 U.S. 103, 111-114 (1975); *United States* v. *Craven*, *supra*; *United States* v. *Thoresen*, *supra*. See also 18 U.S.C. 3146 (release prior to trial); 18 U.S.C. 1073 (flight to avoid prosecution unlawful even if defendant is not guilty of underlying crime).



ord of violence and firearm misuse—[38] he could have and should have established his right to obtain a gun despite his felony conviction in accordance with the statutory scheme.

### B. The Sixth Amendment Does Not Bar Recognition Of The Fact Of A Prior Uncounselled Conviction As A Basis For Imposing A Firearm Disability

Although petitioner does not contest that Congress may constitutionally prohibit invalidly convicted felons in general from possessing firearms, he nonetheless contends that the Sixth Amendment bars the use of uncounselled convictions in this context.[39] To be sure, the Court has made clear that an outstanding uncounselled felony conviction cannot reliably be used for certain purposes. See *Burgett* v. *Texas*, 389 U.S. 109 (1967); *United States* v. *Tucker*, 404 U.S. 443 (1972); *Loper* v. *Beto*, 405 U.S. 473 (1972). But the Court has never suggested that an uncounselled conviction is invalid for all purposes (see, *e.g.*, *Scott* v. *Illinois*, *supra*), and if we are correct in our general

[38] Petitioner has been repeatedly convicted for assaults and misuse of firearms, such as discharging a firearm in a public place. All of these convictions were classified as misdemeanors. Furthermore, in this case, petitioner was arrested as he approached an illegal gambling casino for unlawfully concealing a firearm. See page 4, *supra*.

[39] We assume for the purposes of this discussion that petitioner was convicted in 1961 without the aid of counsel. Such a felony conviction is, of course, invalid. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963); *Kitchens* v. *Smith*, 401 U.S. 847 (1971) (holding *Gideon* wholly retroactive).

submission that the invalidity of a conviction does not *ipso facto* nullify the firearms possession disability of Section 1202(a)(1), that conclusion is as valid where the defect in the conviction is lack of counsel as it is with any other defect.

1. In *Burgett* v. *Texas*, the defendant was indicted for assault with intent to kill and also as a repeat felony offender under a state recidivist statute. 389 U.S. at 111. The indictment, including its reference to the defendant's four prior felony convictions, was read to the jury at the beginning of the defendant's trial. In addition, the prosecution produced evidence regarding two of the convictions during the course of trial. *Id.* at 111-112. However, because at least two of the convictions were invalid,[40] the trial court dismissed the recidivist charges and instructed the jurors to disregard the evidence concerning the invalid convictions. *Id.* at 113 & n.6. The jury thereafter convicted the defendant on the assault charge, and the state courts affirmed.

This Court reversed, stating that "[t]o permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense * * * is to erode the principle of that case." 389 U.S. at 115. The Court found that the introduction of the tainted convictions had prejudiced the defendant de-

[40] One of the convictions was obtained without the aid of counsel and the other was void under state law. The recidivist charge could not be sustained on the basis of the remaining two felonies.



spite the trial court's curative instruction. *Ibid. Burgett* thus established that uncounselled convictions could neither serve as the predicate for a recidivist sentence nor be used as evidence of a defendant's bad character or propensity to commit the charged offense.

*Burgett* was followed in *United States* v. *Tucker*, *supra*, in which the Court held that a convicted defendant's sentence could not be enhanced on the basis of prior uncounselled convictions. 404 U.S. at 448-449.[41] The Court therefore remanded the case for a determination "whether the sentence * * * might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained." *Id.* at 448.[42]

*Loper* v. *Beto*, *supra*, involved use of uncounselled convictions to impeach the credibility of a defendant who had testified at trial. Mr. Justice Stewart's plurality opinion in *Loper* concluded that such impeachment was barred by the decision in *Burgett* because the prosecution had used the uncounselled convic-

[41] Mr. Justice Blackmun, joined by the Chief Justice, dissented on the grounds that Tucker would have received the same sentence even if the sentencing judge had been unaware of the prior convictions. Mr. Justice Powell and Mr. Justice Rehnquist did not participate.

[42] The Court did not forbid the sentencing judge from considering the facts underlying the invalid conviction, and the courts of appeals have concluded that the district court may do so. See, *e.g.*, *United States* v. *Bowdach*, 561 F.2d 1160, 1175-1176 (5th Cir. 1977); *Drayton* v. *New York*, 556 F.2d 644, 646-647 (2d Cir.), cert. denied, 434 U.S. 958 (1977); *United States* v. *Haygood*, 502 F.2d 166, 171-172 n.16 (7th Cir. 1974).

tions "to support guilt." 405 U.S. at 482 (quoting from *Burgett, supra*, 389 U.S. at 115).[43] Mr. Justice Stewart indicated, however, that an uncounselled conviction could be "used for the purpose of directly rebutting a specific false statement made from the witness stand." 405 U.S. at 482 n.11. Thus, the Court recognized that an uncounselled conviction is not void for all purposes and that, for example, a felon could not lie about the fact of his prior conviction even if that conviction were subsequently shown to have been obtained in violation of the Sixth Amendment.

2. Use of an uncounselled felony conviction as the basis for imposing a civil firearms disability, enforcible by criminal sanctions, is not inconsistent with the *Burgett* line of cases. In each of those cases this Court found that the conviction or sentence in question violated the Sixth Amendment because it depended upon the reliability of a particular uncounselled conviction in the past. The federal gun laws, however, focus on the mere fact of conviction, regardless of its reliability, in order to keep firearms away from potentially dangerous people. Criminal liability arises only when a convicted person deliberately ignores the fact of his prior conviction, either by lying about its existence (18 U.S.C. 922(a)(6)) or by receiving, transporting, or possessing a

[43] Mr. Justice White concurred, stating that he would remand for consideration of harmless error. 405 U.S. at 485. The Chief Justice, Mr. Justice Powell, Mr. Justice Blackmun, and Mr. Justice Rehnquist dissented in three different opinions.



firearm (18 U.S.C. 922(g)(1), 922(h)(1), and App. 1202(a)(1)) prior to obtaining judicial, executive, or administrative relief in accordance with the Omnibus Act. The plurality decision in *Loper* seemingly makes clear that such a limited use of the historical fact of an uncounselled conviction does not deprive a defendant of his Sixth Amendment rights. 405 U.S. at 482 n.11.

For example, it could not seriously be contended that the Sixth Amendment would afford a defense to an escape charge if the prisoner's outstanding conviction were invalid under *Gideon*. See, *e.g.*, *United States* v. *Cluck*, 542 F.2d 728, 732 (8th Cir.), cert. denied, 429 U.S. 986 (1976); *United States* v. *Smith*, 534 F.2d 74 (5th Cir. 1976), cert denied, 429 U.S. 1100 (1977); *United States* v. *Allen*, 432 F.2d 939 (10th Cir. 1970); *United States* v. *Haley*, 417 F.2d 625 (4th Cir. 1969); *Lucas* v. *United States*, 325 F.2d 867, 867-868 n.2 (9th Cir. 1963). Yet the logic of petitioner's contention would permit such a defense, since the historical fact of conviction would be used to "support guilt" in that case in just the same fashion that it was used here. It is apparent, however, that Congress may constitutionally rely on the fact of an uncounselled conviction for at least some purposes, particularly where, as here, the immediate collateral consequence of the conviction is simply the imposition of a *civil* disability. See *Mays* v. *Harris*, 523 F.2d 1258, 1260 (4th Cir. 1975).

*Burgett* and its progeny are distinguishable for still another reason. In those cases, the government first attempted to use the prior uncounselled convic-

tion at the time of the subsequent trial. The Court therefore allowed the defendant to challenge the validity of his prior conviction at that time—there being no prior occasion when it would have been relevant for him to have done so. On the other hand, Sections 1202(a), 922(g)(1), and 922(h)(1) impose an immediate firearm disability upon the occurrence of the felony conviction. It is therefore appropriate to require the convicted person who wishes to possess a firearm to resort to the remedies provided by law to challenge the validity of his prior conviction (either in court or pursuant to 18 U.S.C. 925(c) or 18 U.S.C. App. 1203(2)) *before* obtaining a firearm—that is, at the time the adverse consequence attaches. See Note, *Prior Convictions And The Gun Control Act of 1968*, 76 Colum. L. Rev. 326, 338-339 (1976). Accordingly, the Sixth Amendment does not bar imposition of a criminal penalty upon a convicted felon who fails to adhere to the regulatory procedures established by the Omnibus Act, even if his prior conviction proves to be invalid under *Gideon*. See Note, *supra*, 76 Colum. L. Rev. at 339; cf. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967).[44]

[44] In *Walker*, the Court concluded that civil rights demonstrators who violated a previously issued, but unlawful injunctive order based on an unconstitutional statute were nonetheless properly held in contempt. The Court observed that the demonstrators were not simply free to judge their own case and to disregard the order, but rather should have "appl[ied] to the * * * courts to have the injunction modified or dissolved." 388 U.S. at 317, 320-321. So too here, petitioner was not free to judge his own case, but should have applied to the courts to have his conviction set aside or pursued his remedies under the Omnibus Act.



A comparison of the circumstances of an unconstitutionally convicted felon with those of an indictee who is subsequently acquitted illustrates the compelling logic of our position. As we have already indicated, an indictment represents only the grand jury's ex parte determination that there is probable cause to believe that the accused has committed a crime. See note 36, *supra*. Thus, a person may constitutionally be indicted without the aid of counsel, and if an indictee receives a firearm while under indictment he may constitutionally be prosecuted for violating Section 922(h)(1), even if he is thereafter found not guilty. See page 26, *supra*.[45] Petitioner nonetheless insists that the unconstitutionally convicted felon may not be prosecuted under Section 922(h)(1) even though he has been both indicted and found guilty beyond a reasonable doubt by the trier of fact. We submit that the Sixth Amendment does not mandate such an irrational result.[46]

[45] Similarly instructive comparisons can be made between an unconstitutionally convicted felon and an illegal alien or a dishonorable dischargee, neither of whom is entitled to appointed counsel. See note 36, *supra*.

[46] Although petitioner does not make the argument, it might be contended that the imposition of a firearm disability flowing from the fact of conviction is a punishment in violation of the Sixth Amendment where the conviction is invalid under *Gideon*. The disability imposed is civil in nature, however, and many civil or even quasi-criminal disabilities may be imposed without the right to counsel. See, *e.g.*, *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976); cf. *Bell* v. *Wolfish*, *supra*. In any event, just last Term the Court concluded that an uncounselled conviction may serve as the basis

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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for imposition of a criminal fine. *Scott* v. *Illinois*, *supra*. Thus, even if the firearm disability could fairly be described as punishment, the temporary and limited nature of that punishment for a person whose conviction is actually invalid under *Gideon* is less onerous than the fine upheld in *Scott*.

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